

plaintiff herself who says that she was seduced by the defendant and no question of any loss of service to the parents of the plaintiff arises. I repeated the question again to Mr. Ee (counsel for the plaintiff) at the close of the evidence today and his stand, and I think rightly, was that he was not claiming damages for seduction under a separate head but was asking for aggravation of damages because of seduction.

The plaintiff is a Muslim woman who fully realises that the defendant could have married her and divorced her at any time thereafter. She told the court that as a result of the birth which she gave to the child and which she maintains, is the child of the defendant, she did not suffer any handicap in marrying again and that she would not experience any difficulty even after her divorce from Majid, an Indian Muslim, whom she married after the institution of the present suit.

I need not go through the evidence in detail but I find as a fact that a promise was made by the defendant that he would marry the plaintiff. The defendant, however, denies this. I am not prepared to believe the defendant in view of the overwhelming documentary evidence which I find in this case. I am, therefore, of the view that the defendant is guilty of a breach of promise to marry the plaintiff. Considering the social conditions in this country and the habits and customs of the people, I am of the view that the plaintiff was very likely to have suffered humiliation and disgrace as a result of her carrying a child and giving birth to the child without being married to the man who was responsible for it.

My attention was drawn to a passage in *Chitty on Contracts* (21st edn. Vol. I s. 908) and it was urged upon the court that because the plaintiff knew that the defendant was already married, even if the defendant had made any promise to marry the plaintiff, such a promise or agreement in such circumstances was void *ab initio*. This might very well be true of a society in which marriage is a monogamous institution. The parties in the present suit, however, are governed by Muslim law and the defendant is under his own personal law entitled to more than one wife and I consequently hold that such an argument does not apply to the conditions which prevail in this country and more particularly to males professing the Muslim faith.

Having found that the defendant had promised to marry the plaintiff and that the defendant had committed a breach of such promise I assess the damages at the sum of \$1,200. I have heard the counsel for both parties on the question of costs. This is an action purely for damages arising out of a

breach of promise to marry. I see no difference between this action and any other action for damages for breach of contract. As I have already awarded only a sum of \$1,200, I am of the view that the provisions of O. 65 r. 12B of the Rules of the Supreme Court come into play and the plaintiff is entitled only to costs in accordance with the scale prescribed under the Rules of the Subordinate Courts.

Judgment for the plaintiff.

Solicitors: *Ee Yew Lin & Co.; Chelvam & Co.*

SUBRAMANIAN CHETTIAR & ORS. v. J.C. CHANG LTD.

[F.C. (Azmi L.P., Gill F.J. and Lee Han Hoe J.) May 26, 1969]

[Kuala Lumpur—Federal Court Civil Appeal No. X.67 of 1968]

Contract — Land — Option to purchase — Provision for extension of option — Whether option properly exercised — Whether meaning of "not being approved" is synonymous with "refusal".

The appellants who were the owners of lands in Kuala Lumpur had in consideration of the sum of \$1 paid to them by the respondent, granted to the respondent an option for a period of four months from the date of the agreement to purchase the said lands. It was agreed that as from the date of the option the appellants were to give the respondent every assistance to obtain from the planning authorities the permissions and approvals for the development of the lands and it was provided that if the applications for permission and approval were not approved within the period of the option it would be further extended for a further period of eight months. The application for development of the lands put up by the respondent was refused on the ground that the application was for commercial development whereas the land was zoned as open residential development. The respondent then gave further instructions for a further application with amended plans for re-zoning of the option lands for commercial purposes. On July 1, 1966 the third appellant gave notice to the respondent of termination of the option agreement. The respondent entered a private caveat against the lands alleging that the period for completing the sale was up to January 2, 1967. In December 1967 the respondent made a deposit of 10% of the purchase price with the appellants solicitors. At the trial the learned judge came to the conclusion that the exercise of the option was not contingent on the planning approval, that "refusal" of the original application being synonymous with "being not approved" gave the respondent a further period of eight months within which to exercise the option and that since the option was exercised and deposit of 10% of the purchase price made within that period the agreement was binding on the parties. Accordingly he gave judgment for the respondent. The appellants appealed.

Held, allowing the appeal: (1) the option is a conditional contract and so long as the option is in force it could be exercised by the holder;

(2) in this case bearing in mind the object and intent of the option agreement and looking at it as a whole and considering it in its general context, the words "not being approved" were not synonymous with "refusal", so that if the original application was

refused within the first period of four months the option was limited to four months;

(3) there was no option in existence when the respondent purported to exercise it and therefore the appeal must be allowed.

Cases referred to:—

- (1) *London and South Western Railway Co. v. Gomm* (1881-82), 20 Ch.D. 562, 581.
- (2) *Morland v. Hales & Ors. and Sommerville* (1911), 30 N.Z.L.R. 201.
- (3) *Brough v. Nettilton* [1921] 2 Ch. 25.
- (4) *Forbes v. Git* [1922] 1 A.C. 256, 259.

FEDERAL COURT.

Dato' Athi Nahappan for the appellants.

N.A. Majoribanks for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal against a decision of Ibrahim J. declaring that the option agreement between the defendants-appellants and the plaintiff-respondent dated 2nd January, 1966 was binding on the parties and ordering the defendants to deliver to the plaintiff the issue document of title to the option land.

The defendants are the registered owners of lands held under certificates of title Nos. 10186 and 10185 for lots 96 and 95 respectively in the township of Kuala Lumpur. By the aforesaid agreement, in consideration of the sum of \$1 paid to them by the plaintiff, they granted to the plaintiff an option for a period of four months from the date of the agreement to purchase the said lands free from encumbrances at the price of \$782,306.

As from the date of the option the defendants were to give the plaintiff every assistance to obtain from the planning authority and all other necessary authorities the permissions and approvals for the re-zoning and the proposed lay-out and building plans for the development of the said lands with access thereto as the plaintiff should require, and the defendants were to sign all necessary plans and application forms in connection with such permissions and approvals. The Government costs and private survey fees payable in connection with the subdivision were to be borne by the plaintiff.

The option was to be exercised at any time within the option period by the plaintiff giving notice in writing to the defendants at the given address of its intention to purchase the said lands at the said price of \$782,306. Upon the exercise of the option as aforesaid the plaintiff was to pay to the defendants 10% of the purchase price by way of deposit and in part payment thereof and the defendants were to deliver the documents of title to the said lands to the plaintiff's solicitors.

Clause 5 of the agreement provided as follows:—

"In the event of the applications for permission and approval as aforesaid being not approved the option contained herein shall be automatically extended on a month to month basis for a further period of eight months until such time as the Government finally refuses all proposed development plans including amended plans if any proposed by the grantee. Notwithstanding the provisions hereof the grantee may determine this option at any time on giving to the grantor one month's prior notice in writing."

The words "of eight months" were inserted in the printed form of the agreement in handwriting at the request of the defendants.

After the signing of the agreement, Chang Foo Chiang (P.W.1), the managing director of the plaintiff company, instructed his architect *Dato' Eric Taylor* (P.W.3) to prepare the necessary plans for submission to the appropriate authority for approval. The defendants as owners signed the plans and the application, which were forwarded to the Chief Planning Officer, Federal Capital, Kuala Lumpur, on 14th February, 1966. By a refusal notice dated 14th April, 1966 the application was refused on the ground that the proposed development contravened the 1939 approved town plan, the application being for commercial development whereas the land was zoned as open residential development.

Mr. Chang then instructed the architect to send in a further application with amended plans. *Dato' Eric Taylor* had some discussions with Mr. Frank Watkinson (P.W.2), the Chief Planning Officer, and on 24th June, 1966 applied for re-zoning of the option land for commercial purpose. No plan at all accompanied this application. It is to be observed that the first application was in effect also an application for re-zoning. On 21st January, 1967 the Chief Planning Officer sent a letter to the architect to say that the application for re-zoning was included in the Master Plan which was then under consideration.

On 28th November, 1967 the Chief Planning Officer received an application through the architect from Ideal Realty & Investments, Ltd. as prospective purchasers of lots 95 and 96 to build shop houses, an emporium and a petrol station. This application was accompanied by site plans, and it was made so that the re-zoning could be carried out without waiting for the whole Master Plan to be approved. On 29th December, 1967 the Chief Planning Officer replied to say that since proceedings had been going on with regard to the Master Plan it would be better if the application was considered together with the Master Plan.

By a letter dated 18th July, 1966 the third defendant gave notice to the plaintiff of termi-

nation of the option agreement. On 3rd August, 1966 the plaintiff entered a private caveat against the land. In the application for entry of the private caveat and the accompanying statutory declaration the plaintiff stated that the period for completing the sale was up to 2nd January, 1967. In December, 1967 the plaintiff made a deposit of 10% of the purchase price with the defendants' solicitors.

There was no dispute regarding the evidence produced by the plaintiff as to the events which took place after the signing of the option agreement, and the defendants called no evidence. On that evidence and after considering the documentary evidence in the case, the learned trial judge arrived at the conclusion that the exercise of the option was not contingent on the planning approval, that "refusal" of the original application being synonymous with "being not approved" clause 5 of the option agreement automatically came into force giving the plaintiff a further period of eight months within which to exercise the option to purchase, and that since the option was exercised and a deposit of 10% of the purchase price made within that period the agreement was binding on the parties. Accordingly he gave judgment for the plaintiff.

As there is no dispute about the facts of the case the sole question raised by this appeal relates to the construction to be put upon the option agreement between the parties. Indeed, the substance of the numerous grounds of appeal set out in the appellants' memorandum of appeal is that the court below erred in construing the agreement.

The first contention of the appellants is that the sum of \$1 paid under the agreement was for the purchase of the option and that the payment of 10% of the purchase price was to be the consideration for the option to purchase the land. Their argument is that in the event of payment of 10% of the purchase price what was so purchased was not a binding contract but merely an option to purchase the land. In other words, what they are saying is that the agreement was an offer and that such offer was to be accepted by payment of 10% of the purchase price for a binding option to come into existence. I can find no rule of law to support this rather ingenious argument put forward by counsel for the appellants.

An offer is to be distinguished from an option, the latter being a contract or other act in the law containing a term by which one party (who may be called the optionholder) is empowered to elect within a specified time whether the contract or other act in the law shall operate further than by conferring the power of so electing it has already done. In other

A words, an option is an act in the law which is conditional upon the optionholder electing that it shall become fully and (so far as regards the power of election) unconditionally operative between the parties. We are here concerned only with options which are conditional contracts, not with those which are conditional acts in the law of other descriptions, as, e.g., assignments. To a conditional contract which is an option the form of a deed, or else consideration, is as necessary as to any other contract. It might at first sight be thought that if the contemplated performance should involve some act or promise on the part of the optionholder this would be sufficient as consideration. But this is not so. So long as the matter does not advance beyond the stage of an option the optionholder has in respect of the contemplated performance done nothing at all — neither performed an act nor given a promise. If the option is not by deed, therefore, the grantee of the option must give some consideration quite apart from anything which he may have to do should he exercise the option. (See pages 131 and 132 of *Salmond and Williams* on Contracts, 2nd edition.).

E He who has obtained such an option has the benefit not of a mere revocable offer but of an irrevocable and binding, though conditional, contract. For example, A, the owner of Blackacre, may agree with B that in consideration of £1 paid by B, B shall be entitled to purchase Blackacre for £100 if within one month he notifies A of his election to do so. In such a case A has entered into a conditional contract with B to sell Blackacre to him and this contract ceases to be conditional and becomes absolute so soon as B fulfils the condition of exercising the option in the stipulated manner. The case is not one of a mere revocable offer; on the contrary the seller has received consideration (*viz.*, £1) for a promise to sell; and the promise, which would otherwise have been honorary merely, has thereby become a contract. (See pages 132 and 133 of *Salmond and Williams* on Contracts, 2nd edition.).

H It may, indeed, be suggested that, although such an option arises from and is conferred by way of contract, the terms specified in it as those which the optionholder may elect to accept are not themselves, before acceptance, an existing contract or part of such a contract but are merely the terms of a contract not yet existing but which the grantor of the option contracts with the grantee to make with him on his request within the specified time. In other words, it may be suggested that an option is merely an offer and therefore revocable like any other offer, but that the offeror has entered into a collateral contract for good consideration not to revoke his offer, and will therefore be

liable in damages if he wrongfully revokes it. If this were so, however, the revocation of an option would be legally effective to prevent the subsequent acceptance of it from constituting a contract, the remedy of the optionholder being merely an action for damages for being so deprived of his opportunity of entering into the contract specified in the option. But this is not the true interpretation or effect of the grant of an option. The consideration given by the optionholder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively. Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become *ipso jure* an absolute contract by the fulfilment of the condition. The true formula of the grant of an option (for the sake of simplicity taking only the case of an option by way of simple contract) is not: "I promise for good consideration hereafter to enter into such and such a contract with you if within a certain time you demand that I do so." The true formula is, on the contrary: "I here and now for good consideration contract with you on such and such terms, subject to the condition that within a certain time you give me notice that you intend to demand fulfilment of my contract." (See pages 133 and 134 of *Salmond and Williams* on Contracts, 2nd edition.)

In the leading case of *London and South Western Railway Co. v. Gomm*,⁽¹⁾ which concerned an option to repurchase land contained in a deed of conveyance, Jessel M.R. thus stated the effect of such an option:—

"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

In *Morland v. Hales & Ors. and Somerville* ⁽²⁾ a person for valuable consideration obtained an option to purchase certain land at a price named. The option was to remain open for ten days. The vendors, under the impression that such person had abandoned his option, sold during that period to a third party. The holder of the option subsequently, but within the period named, exercised his option by acceptance communicated to the vendors' agent. It was held by the Court of Appeal, reversing the decision of Stout C.J., that the option created an interest in land, and that the holder thereof had a superior equity to the third party and

A was therefore entitled as between himself and the third party to specific performance of his contract. In the leading judgment of the Court of Appeal, Williams J. said, at page 208:—

"In the case of an option for valuable consideration to purchase at a named price, the matter is altogether out of the vendor's hands, and it rests with the holder of the option alone whether he will exercise the right to purchase the lands which the option gives him. The holder of the option has a vested right to take the land from the owner without his consent. It is difficult, on the one hand, to see how an interest in land could pass to a third person under a contract which does not compel the owner of the land to sell at all unless he chooses; and, on the other, how it could not pass where there is an absolute right to purchase, and it rests entirely with the owner of that right to decide whether he will purchase. If an interest in the land passed in the present case by virtue of the option, the estate in equity, which passed to Somerville under his contract with the syndicate, would necessarily be subject to that interest. Somerville cannot claim as a purchaser for value without notice, as his contract has not been completed by payment of the purchase-money and a conveyance of the legal estate. The appellant, therefore, if he properly exercised an option which he had not abandoned, would be entitled to specific performance of the contract which his exercise of the option created."

In the concluding passage of his judgment, his Lordship said, at page 212:—

"I think, therefore, first, that an interest in land passed by the option; secondly, that if an interest in land did not pass, yet the option was a contract affecting the land which the court will enforce in priority to the subsequent contract with Somerville. In either case, if the option has been duly exercised, there is no superior claim which would disentitle the plaintiff to specific performance."

F In *Brough v. Nettleton* ⁽³⁾ A. verbally agreed with B. to grant him a lease of a certain house for 2½ years from October 1, 1917 at a specified rent. It was further agreed that B. should have the option, to be exercised in writing, of purchasing the house at any time during the tenancy for £500. On the faith of this parol agreement B. went into possession of the house, regularly paid rent, and on December 30, 1919, exercised in writing his option to purchase. A. refused to sell the house, alleging that no such agreement existed and that B. was only a yearly tenant at the specified rent; alternatively, he relied on the Statute of Frauds. It was held that the possession taken by B. was an act of part performance which enabled him to give evidence of all the terms of the parol agreement for tenancy, and entitled him to specific performance of that agreement including the option to purchase. Lawrence J. said (p. 29):—

"... Although the defendant's obligation to sell the house did not become operative unless and until the plaintiff gave him notice to exercise his option, nevertheless such obligation was imposed upon the defendant by the agreement of August, 1917, and by none other. Such obligation was an essential term of the agreement upon the faith of which the plaintiff entered into possession, and can, in my judgment, be enforced without

the necessity of proving any further act of part performance just as much as any other term of the agreement could have been so enforced."

In the present case, the plaintiff paid to the defendants a sum of \$1 at the time of or prior to the execution of the agreement. This payment of \$1 was stated in the agreement to be in consideration of the grant of the option for a period of four months from the date of the agreement. Thus, there came into existence a valid and binding option. Under that option the plaintiff obtained the benefit not of a mere revocable offer but of an irrevocable and binding, though conditional, contract, because the consideration given by the plaintiff deprived the defendants not merely of the right to revoke the option lawfully, but of their power to revoke it effectively before the lapse of the period of the option.

The agreement provided that the plaintiff might determine the option at any time on giving to the defendants one month's prior notice in writing. That of course was one method of putting an end to the option. The same result could be obtained by the plaintiff sitting back and doing nothing by way of exercise of the option during the period of four months. The provision as regards the determination of the option by the plaintiff was merely to release the defendants from their conditional contract if the plaintiff decided at any time before the end of the period of option that it was no longer interested in the land. There is therefore nothing in the argument put forward by the appellants that this provision in the agreement made it one-sided in favour of the plaintiff.

There was nothing in the agreement as to the purpose for which the plaintiff required the land. There was no stipulation in the agreement that the plaintiff intended to or could exercise the option only on approval of the proposed lay-out and building plans for the development of the land. All that clause 3 of the agreement said was that the defendants were to give the plaintiff every assistance in obtaining the necessary permissions and approvals from the appropriate authority. Assuming that clause 5 of the agreement came into force, so that the option agreement was automatically extended as provided in the clause, the plaintiff was entitled to exercise the option to purchase at any time during such extended period. The learned trial judge therefore was quite right in coming to the conclusion that the exercise of the option was not contingent on any planning approval.

The plaintiff's case rested on the assumption that the option was automatically extended at least for a period of eight months, that since

A he had exercised the option during that period and made payment of the necessary deposit the option agreement was binding on the parties, and that by reason of the payment of such deposit there was a concluded sale agreement. The appellants contend that even if the option period was so extended the sale was to be completed within that period. I do not agree. B Clause 5 of the agreement had nothing whatever to do with completion of the sale which was governed by clause 9.

C On the question of extension of the period of option it is to be observed that clause 5 provided for an extension "on a month to month basis for a further period of eight months until such time as the Government finally refuses all proposed development plans including amended plans if any proposed by the grantee". The question therefore is whether the option was extended "for eight months" or "until such time as the Government finally refuses all proposed development plans". In this connection, counsel for the appellants cited the following passage from the judgment of the Privy Council in *Forbes v. Git*:—⁽⁴⁾ D

E "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails." *Chitty on Contracts* (22nd Edition) Volume I, page 263, paragraph 604 says:—

F "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. The old rule where two clauses in a contract are so totally repugnant to each other that they cannot stand together was that the earlier is to be received and the later rejected. This, however, seems to be a mere rule of thumb, totally unscientific, and only to be resorted to when all else fails. In any event, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement." G

H There can be no doubt that the later clause with regard to extension of time was manifestly inconsistent with or repugnant to the rest of the agreement. Consequently, the later clause has to be rejected, so that upon a true construction of clause 5 of the agreement the option could be extended only for a further period of eight months.

I The crux of this appeal lies in the answer to the question as to whether or not clause 5 of the agreement came into force. In attempting to find an answer to that question, it is necessary to look at the main object and intent of the contract. It is clear that the option lands were then zoned for residential purposes. It is equally and abundantly clear that the plaintiff intended to develop them for commercial purposes. It follows therefore that the plain-

tiff had no intention of entering into any binding contract for the purchase of the lands without some sort of assurance that its plans for the proposed development would be approved. It was in order to enable it to ascertain from the appropriate authority whether its plans for commercial development would be approved that the option was initially for four months. It is common knowledge that approvals of such plans take time. It was for that reason that clause 5 provided for the option to be extended so as to give the plaintiff ample time in which to obtain such approval. The defendants, quite understandably, were not prepared to agree to an extension for an indefinite period. Provision was therefore made at their request for this extension to be limited to eight months.

As I have said, the extension was agreed to by the parties so as to allow ample time for a decision to be obtained from the appropriate authority on the application for development of the lands for commercial purposes. Clause 5 of the agreement therefore was to come into operation only if no decision was made on the application within four months. To my mind, it was not to come into operation if a decision was made, one way or the other, by the appropriate authority within that period. I agree that the words "not being approved" can be synonymous with "refused". But bearing in mind the object and intent of the option agreement and looking at it as a whole and considering it in its general context, the words "not being approved" were not synonymous with "refused", so that if the original application was refused within the first period of four months the option was limited to four months.

As I have stated earlier, it was open to the plaintiff to exercise the option even after the refusal of his application before the expiry of the period of four months. But this was not done and there was no application before the appropriate authority after the refusal of the initial application on 14th April, 1966 and before the option agreement came to an end by effluxion of time. The discussions which Dato' Eric Taylor had with Mr. Watkinson cannot be said to have resurrected the application which had been refused. If the application had not been refused but had been returned for some amendments and it was re-submitted with the necessary amendments, then if no final decision was made on it before the end of the initial period of the option agreement, clause 5 would have come into operation so as to extend the option for a further period of eight months.

It seems clear from the agreement that for clause 5 to come into operation the condition precedent was that there should be in the hands of the appropriate authority on the last day of

A the initial period of the option a formal application together with the proposed plans for approval on which no decision had been made. Obviously the provision for extension of the option was made so as to allow more time for a decision to be obtained on the original application. Needless to say, there was no provision B in the agreement for a further application to be made in the event of the first application not being approved within the initial period of the option. The first application having been refused, clause 5 of the agreement therefore never came into force.

C In my opinion, there was no option in existence when the plaintiff purported to exercise it. It was contended by the respondent that the appellants did not give notice of termination of the option agreement until long after the date of the expiry of the period of four months. The short answer to that is that the appellants D presumably knew nothing about the application having been refused. In any event, there was no evidence that they were informed about it as soon as the refusal notice was received by the plaintiff. Moreover, in my judgment the notice of termination of the option agreement has no bearing whatsoever on the case. Indeed, no E notice to terminate the option was necessary when the option had terminated itself by lapse of time.

F I would therefore allow the appeal, set aside the judgment of the court below and substitute for it an order that the suit do stand dismissed. The respondent must pay the costs of this appeal and costs in the court below. The deposit made by the appellants towards costs is to be refunded to them.

Azmi L.P. and Lee Hun Hoe J. concurred.

Appeal allowed.

G Solicitors: *Athi Nahappan & Co.; Lovelace & Hastings.*

PAN AH BA & ANOR. v. NANYANG CONSTRUCTION SDN. BHD.

H [F.C. (Azmi L.P., Gill F.J. and Lee Hun Hoe J.) May 26, 1969]

[Kuala Lumpur—Federal Court Civil Appeal No. X.73 of 1968]

I *Contract — Land — Agreement of sale — Payment of deposit — Agreement requiring intending purchaser to enter into a formal agreement, on failure of which deposit to be forfeited — Whether performance of promise dispensed with — Contracts (Malay States) Ordinance, 1950, s. 63.*

This was an appeal by the plaintiffs, administrators of the estate of Ng Lye Hoong deceased, against the judgment of the High Court dismissing their claim ([1969] 1 M.L.J. 39). The deceased Ng Lye Hoong entered into an agreement with the respondent company for